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Nos. 91-199 and 91-439

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANCESCO GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

IGNAZIO ANTONINO MANNINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court may conditionally admit co-conspirator declarations subject to a determination at the close of the evidence that the government has satisfied the requirements of Federal Rule of Evidence 801(d)(2)(E).

2. Whether a mistrial should have been declared after one of the defendants changed his plea to guilty in the middle of petitioners' trial, and, if not, whether that defendant should have been barred from testifying for the government.

3. Whether the government made improper use, during closing argument, of the guilty pleas of a defendant and another testifying co-conspirator.

4. Whether federal agents conducting electronic surveillance failed to minimize the interception of conversations as required by 18 U.S.C. 2518(5).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Bourjaily v. *United States*, 483 U.S. 171 (1987)	11
Darden v. *Wainwright*, 477 U.S. 168 (1986)	20
FW/PBS, Inc. v. *Dallas*, 493 U.S. 215 (1990)	17
Lakeside v. *Oregon*, 435 U.S. 333 (1978)	15
Opper v. *United States*, 348 U.S. 84 (1954)	15
Richardson v. *Marsh*, 481 U.S. 200 (1987)	15
Scott v. *United States*, 436 U.S. 128 (1978)	20, 23
Trussell v. *United States*, 278 F.2d 478 (6th Cir. 1960)	17
United States v. *Andrus*, 775 F.2d 825 (7th Cir. 1985)	11
United States v. *Arnold*, 890 F.2d 825 (6th Cir. 1989)	18
United States v. *Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980)	11
United States v. *Dworken*, 855 F.2d 12 (1st Cir. 1988)	16
United States v. *Eason*, 920 F.2d 731 (11th Cir. 1990)	17
United States v. *Ferra*, 900 F.2d 1057 (7th Cir. 1990)	12
United States v. *Gambino*, 734 F. Supp. 1084 (S.D.N.Y. 1990)	22
United States v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970)	11-12
United States v. *Haimowitz*, 725 F.2d 1561 (11th Cir.), cert. denied, 469 U.S. 1072 (1984)	11
United States v. *Harrell*, 436 F.2d 606 (5th Cir. 1970)	17
United States v. *Hernandez*, 829 F.2d 988 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988)	12
United States v. *Holloway*, 731 F.2d 378 (6th Cir. 1984)	12

Cases—Continued: Page

United States v. *Ianniello*, 621 F. Supp. 1455 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987) 12
United States v. *Kilrain*, 566 F.2d 979 (5th Cir.), cert. denied, 439 U.S. 819 (1978) 15
United States v. *Kimble*, 719 F.2d 1253 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984) 11
United States v. *Louis*, 814 F.2d 852 (2d Cir. 1987) 16
United States v. *Martinez*, 775 F.2d 31 (2d Cir. 1985) 17
United States v. *Miliet*, 804 F.2d 853 (5th Cir. 1986) 12
United States v. *Mobile Materials, Inc.*, 881 F.2d 866 (10th Cir. 1989), cert. denied, 493 U.S. 1043 (1990) 11
United States v. *Nelson*, 603 F.2d 42 (8th Cir. 1979) 11
United States v. *Perez*, 658 F.2d 654 (9th Cir. 1981) 11
United States v. *Robinson*, 485 U.S. 25 (1988) 18
United States v. *Saenz*, 747 F.2d 930 (5th Cir. 1984), cert. denied, 473 U.S. 906 (1985) 16
United States v. *Troutman*, 814 F.2d 1428 (10th Cir. 1987) 12
United States v. *Wilkinson*, 754 F.2d 1427 (2d Cir.), cert. denied, 472 U.S. 1019 (1985) 20
Weatherford v. *Bursey*, 429 U.S. 545 (1977) 15

Constitution, statutes and rules:

U.S. Const. Amend. VI 15
Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, Tit. I, § 106(c), 100 Stat. 1856 24
Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 18 U.S.C. 2510 *et seq.*:
18 U.S.C. 2510-2521 20
18 U.S.C. 2518(5) 20
18 U.S.C. 1956(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 963 2
Fed. R. Evid. 801(d)(2)(E) 10, 11, 12, 14

Miscellaneous: Page

S. Rep. No. 541, 99th Cong., 2d Sess. (1986) 24
2 J. Weinstein & M. Berger, *Weinstein's Evidence* (1991) 16

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 43a-104a,[1] is reported at 926 F.2d 1355. The opinion of the

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[1] "Pet. App." refers to the appendix to the petition in No. 91-199.

district court, Pet. App. 1a-42a, is reported at 728 F. Supp. 1150.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1991. Pet. App. 43a-104a. On May 17, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to July 22, 1991. On July 9, 1991, Justice Souter further extended the time for filing a petition for a writ of certiorari to August 1, 1991. The petition in No. 91-199 was filed on that date.

On June 6, 1991, Justice Souter denied a request by the petitioners in No. 91-439 for an extension of time to file a petition for a writ of certiorari. The petition in No. 91-439 was not filed until September 13, 1991, and is therefore substantially out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners Francesco Gambino, Ignazio Antonino (Tony) Mannino, and Emannuele Salvatore (Sal) Mannino were convicted of conspiring to import heroin, in violation of 21 U.S.C. 963, and conspiring to distribute heroin, in violation of 21 U.S.C. 846. Sal Mannino was also convicted of money laundering, in violation of 18 U.S.C. 1956(a)(1). Petitioner Enzo Varisco was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. The district court sentenced Gambino to a total of 30 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a $50,000 fine. C.A. App. 653-656. The court sentenced Tony Mannino to a total of 27 years' imprisonment, to be followed by five years' supervised release, and

ordered him to pay a $25,000 fine. C.A. Supp. App. 113-117. The court sentenced Sal Mannino to a total of 18 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a $25,000 fine. C.A. Supp. App. 118-122. The court sentenced Enzo Varisco to 15 years' imprisonment, to be followed by five years' supervised release, and ordered him to pay a fine of $10,000. C.A. Supp. App. 123-127. The court of appeals affirmed. Pet. App. 43a-104a.

1. The evidence at trial showed that petitioner Francesco Gambino supervised the importation and distribution of heroin in the New York-New Jersey area from 1985 to 1988. The scheme was coordinated by petitioner Tony Mannino and Simone Zito, with assistance from Tony Mannino's brother petitioner Sal Mannino, Tony Mannino's wife Grace Mannino, and Simone Zito's brother Stefano Zito. Petitioner Enzo Varisco was one of the conspiracy's cocaine distributors.[2] Pet. App. 44a.

William Kane, an FBI informant and the government's principal witness at trial, ran an illegal video poker business in New York City with Giuseppe "Joe" Gambino. Kane operated the business out of the Cafe Giardina in Brooklyn, which was owned by Joe Gambino. Through his illegal gambling business, Kane gained first-hand knowledge of the conspiracy in this case. Pet. App. 45a.

In October 1986, Kane became a confidential informant for the FBI. In 1986 and 1987, Kane was introduced to Simone Zito and Tony Mannino, and later to Simone Zito's brother, Stefano Zito. Stefano

[2] Co-defendants Simone and Stefano Zito were fugitives at the time of trial. Co-defendant Grace Mannino was tried and convicted with petitioners.

Zito and Kane became friends. In 1987, Stefano told Kane that he, his brother Simone Zito, and Tony Mannino were members of the Sicilian Mafia and that they were importing heroin into the United States. Stefano told Kane that Tony's brother Sal Mannino was in Sicily at that time, arranging an exchange of heroin for cocaine. FBI interceptions of telephone conversations confirmed that Sal Mannino was in Sicily at the time. Pet. App. 45a-46a.

Under FBI supervision, Kane began to participate in the conspirators' illegal activities. Since neither Simone nor Stefano Zito had any legal source of income, Kane carried them on the payroll of his video poker company. Kane also arranged financing for their automobiles. Pet. App. 46a.

In October 1987, Kane became directly involved in the conspiracy. In that month, Simone Zito told Kane that Simone wanted to purchase a townhouse, as an investment and as a place to cut heroin, but that all his money was tied up in heroin. After first discussing a possible loan, Simone agreed, in a tape-recorded conversation, to sell Kane seven ounces of heroin for $25,000. That conversation also revealed some of the details of Simone Zito's relationship with Tony Mannino. Kane mentioned that he did not want anyone to know about the transaction, not even Tony Mannino. Simone replied that "me and Tony's the same person." Pet. App. 47a.

Simone Zito delivered the heroin to Kane later that evening. The next day, Kane paid Simone Zito $25,000. Tony Mannino accompanied Simone to the meeting at which the payment was made. After the money was transferred, Kane, Mannino, and Simone discussed further heroin sales. In the course of subsequent discussions, Kane mentioned that his boss was Joe Gambino. Mannino responded that he and

Simone Zito were supervised by Francesco Gambino. Pet. App. 47a-48a.

On several other occasions, Kane and Simone Zito discussed heroin transactions in both recorded and unrecorded conversations. In March or April 1988, the two had a conversation in the Cafe Giardina that corroborated Mannino's earlier statement that he and Simone Zito worked for Francesco Gambino. Simone offered to sell Kane a kilogram of heroin on the spot. Kane could not purchase drugs without FBI authorization, but since he did not want to seem uninterested, he countered with a much lower offer. Simone then walked to the rear of the restaurant, out of Kane's sight. He returned with the information that the price was negotiable and that Kane could take a sample home to New Jersey. Shortly thereafter, Kane determined that the only people in the restaurant, other than himself and Simone Zito, were Francesco Gambino and a bartender. Pet. App. 48a-49a.

The government also presented evidence of the workings of the heroin importation scheme. Several members of the conspiracy who were indicted with petitioners pleaded guilty and testified for the government. One co-conspirator, Salvatore Allegra, testified that in 1985 he was asked by Tommaso Scalici to hire couriers to smuggle heroin into the United States. Supervised by Simone Zito, Allegra arranged for couriers to travel to the United States from Sicily with packages of heroin hidden on their bodies. In the United States, the heroin was delivered to Salvatore Caruso, an associate of Francesco Gambino's. Allegra oversaw several deliveries before he was arrested by Italian authorities in 1986. Pet. App. 49a-50a.

Two other incidents corroborated petitioners' role in the conspiracy. Kane helped Stefano and Simone Zito obtain automobiles. Kane made those arrangements through Robert Reyers, who owned an automobile dealership in southern New Jersey. Through those transactions, Reyers became familiar with Stefano and Simone Zito, Tony Mannino, and Enzo Varisco. Reyers testified as a witness for the government at trial. In January 1988, Reyers told Kane, Simone Zito, and Tony Mannino that Reyers' wife, a court reporter in the federal courthouse in Philadelphia, could obtain names that were referred to in proceedings before a federal grand jury sitting in the Eastern District of Pennsylvania. Soon afterwards, Simone Zito gave Reyers a list of four names, with instructions to contact him immediately if any of the names came up before the grand jury. Those names included Simone Zito, Tony Mannino, Domenico Mannino, and Francesco Gambino. Pet. App. 54a-56a.

The second incident was recounted by Simone Ricupa, a former heroin dealer in New York City. One day in 1985, Ricupa learned from his supplier, Sal DiMaggio, that DiMaggio's source of heroin wanted him to send a large amount of money to Italy as soon as possible. Ricupa gathered about $100,000 from some of his dealers, placed it in a paper bag and, as instructed, delivered the money to DiMaggio's restaurant. When he arrived at the restaurant, Ricupa saw Francesco Gambino sitting in a car parked near the restaurant. Ricupa and DiMaggio went into the restaurant, and DiMaggio went to an apartment upstairs. While he was waiting, Ricupa could see Gambino from the restaurant. DiMaggio returned downstairs with two large shopping bags, which he carried out to Gambino's car. After a quick discussion with Gambino, DiMaggio placed the bags

in the car, and Gambino drove away. Pet. App. 56a-57a.

2. a. The court of appeals affirmed petitioners' convictions. In response to Gambino's claim that the district court erred when it conditionally admitted out-of-court declarations prior to determining their admissibility, the court of appeals observed that "'the control of the order of proof at trial is a matter committed to the discretion of the trial judge.'" Pet. App. 60a. "[W]e have consistently recognized," the court noted, "that 'the order-of-proof problem confronting the trial judge is a particularly difficult one where the government is attempting to prove the participation of multiple defendants in a continuing conspiracy.'" *Id.* at 63a.

The court of appeals observed that the interrelated testimony in this case illustrates the impracticality of a requirement that the admissibility of co-conspirator declarations always be determined prior to the introduction of the declarations. The court explained that "[e]xcept for Kane, most of the government's witnesses testified only to discrete corners of the conspiracy. Only Kane provided a common thread linking virtually all the conspiracy's actions. Therefore the conspiracy became clearly defined only after the testimony of several witnesses." Pet. App. 64a-65a. The court held that the district court's decision to admit the testimony subject to later connection avoided unnecessary complexity and jury confusion, and was not an abuse of discretion.[3]

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[3] The court of appeals noted that Gambino did not timely object to Kane's testimony on the ground that the district court had not determined whether it was admissible. The court of appeals therefore concluded that it could review that challenge only for plain error. Pet. App. 61a-62a n.4. In addition, the court of appeals summarily dismissed the contention raised

b. The court of appeals also rejected petitioners' contention that the prosecution misused the guilty pleas of co-conspirator witnesses, and in particular that of Robert Reyers. Reyers started the trial as a defendant but changed his plea to guilty on the 12th day of the 26-day trial. Reyers then testified, during the government's case-in-chief, that some of Kane's testimony agreed with his own recollection of events and that Kane had told him about many of the incidents Kane mentioned at trial. Pet. App. 81a.

The court of appeals observed that guilty pleas are properly elicited on direct examination to dampen subsequent attacks on credibility and to foreclose any suggestion that the party producing the witness is concealing evidence. The court found that the government's introduction of Reyers' guilty plea, as well as those of other cooperating witnesses, was permissible on that basis. The court further found that the district court properly instructed the jury on the appropriate uses of guilty pleas, and that as with the guilty pleas of the other co-conspirators, Reyers' guilty plea was not inappropriately emphasized by the prosecution. Pet. App. 83a-84a.

The court of appeals also rejected petitioners' claim that remarks made by the prosecution during closing arguments required a new trial. The court observed that a central focus of petitioners' closing arguments and much of their defense at trial was Kane's alleged lack of credibility. Petitioners' counsel had vigorously attacked Kane in their closing arguments, having elicited that Reyers, while still a defendant, had commented to Gambino's counsel that Kane was a liar. Counsel for Tony Mannino argued that "[the

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by Tony Mannino and others that Stefano Zito's statements were not in furtherance of the conspiracy. *Id.* at 103a.

prosecution] knew before they put him on the stand" that Kane was "a perjurer." Pet. App. 86a-88a. Counsel for Gambino accused a prosecutor of cajoling Kane during a lunch break to alter his testimony. Tr. 4396. After those remarks, the prosecution, in its rebuttal argument to the jury, suggested that Reyers' guilty plea belied his asserted lack of faith in the veracity of Kane's testimony.

> Now [Counsel for Tony Mannino], in talking about William Kane, told you what a liar he was, and other attorneys have. But remember this: Reyers and Joseph Cuffaro thought that he was such a liar that, based on his evidence against them, they pled guilty. * * * You heard Mr. Cuffaro testify that, as the result of the sale of 15 kilograms of cocaine in Florida, he was indicted, and the sale was to Bill Kane. He was indicted and he pled guilty. And you heard Mr. Reyers, that he pled guilty, and you heard during the course of this trial that the evidence against Mr. Reyers came primarily from William Kane.

Pet. App. 89a.

The court of appeals found the prosecution's remarks to be "proper as a fair and invited response to the defendant's vehement attacks on Kane's credibility." Pet. App. 91a. The court found it significant that "the challenged statements left undisturbed the jury's prerogative to decide all questions of credibility. If there was any ambiguity, it was cleared up in the district court's instructions, in its final charge, that evaluating the credibility of witnesses was the function of the jury." Pet. App. 97a-98a.

The court of appeals noted that a prosecutor's references to guilty pleas would constitute reversible error if used as substantive evidence of a defendant's

guilt. But the court found a direct nexus between Reyers' plea and the attacks on Kane's credibility, and concluded that, as a result, the prosecutor's reference to Reyers' plea did not invite the jury to use the plea as substantive evidence of petitioners' guilt. Finally, the court noted, any possible misunderstanding of the appropriate use of the guilty pleas was removed by the district court's instruction to the jury that the guilt of any person was not evidence of any other person's guilt. Pet. App. 99a-101a.

c. The court of appeals summarily dismissed the claim by Tony Mannino and others that the government had failed adequately to minimize the interception of communications overheard as a result of court-authorized electronic surveillance. Pet. App. 104a.

ARGUMENT

1. Petitioners contend that the district court erred in admitting co-conspirator declarations at trial. Petitioner Gambino insists (91-199 Pet. 9-23) that it was improper for the court to admit the declarations before ruling them admissible. Petitioners Tony Mannino et al. maintain (91-439 Pet. 27) that Stefano Zito's statements were inadmissible because they were not made in furtherance of the conspiracy.

a. Federal Rule of Evidence 801(d)(2)(E) excludes from the definition of hearsay "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Such statements are admissible upon a showing that the declarant and the party against whom the statement is offered were members of the conspiracy, and that the statement was made during the course of and in furtherance of a conspiracy. See *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987).

Gambino states that the district judge did not find that the requirements of Rule 801(d)(2)(E) had been met until "*after the jury had rendered its verdict.*" Pet. 10 (emphasis in original); see also Pet. i. In fact, the district judge made the findings required by the Rule at the conclusion of the government's case and before the matter went to the jury. See Tr. 4105-4109 (detailed findings by district court on admissibility of co-conspirator declarations). The question presented is therefore whether the district court erred in deferring a determination of the admissibility of the co-conspirator declarations until after the close of the government's case-in-chief.

The courts of appeals have unanimously rejected Gambino's contention that district courts should be barred from conditionally admitting co-conspirator declarations. Instead, they have held that district courts have discretion to admit statements of conspirators subject to a later determination that the defendant against whom the evidence was offered is a member of the charged conspiracy. See, *e.g.*, *United States* v. *Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989), cert. denied, 493 U.S. 1043 (1990); *United States* v. *Andrus*, 775 F.2d 825, 837 (7th Cir. 1985); *United States* v. *Haimowitz*, 725 F.2d 1561, 1575 (11th Cir.), cert. denied, 469 U.S. 1072 (1984); *United States* v. *Kimble*, 719 F.2d 1253, 1257 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984); *United States* v. *Perez*, 658 F.2d 654, 658-659 (9th Cir. 1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 456 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Nelson*, 603 F.2d 42, 44-45 (8th Cir. 1979); *United States* v.

Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).[4]

Requiring a pretrial hearing in every case would have significant disadvantages, and the present case illustrates them well. A pretrial hearing would have been nothing short of "a mini-trial, significantly prolonging the proceedings in the case and affording the defendants a complete preview of the government's evidence." *United States* v. *Ianniello*, 621 F. Supp. 1455, 1478 (S.D.N.Y. 1985), aff'd, 808 F.2d 184 (2d Cir. 1986), cert. denied, 483 U.S. 1006 (1987). On the other side of the scale, Gambino suffered no prejudice, because the district court held all of the co-conspirator declarations to be admissible. Although Gambino suggests that a district court will be hesitant to reverse the conditional admission of co-conspirator declarations (91-199 Pet. 13-17, 22), that suggestion presupposes

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[4] None of the cases cited by petitioner (91-199 Pet. 12-13) conflicts with the above decisions. See *United States* v. *Ferra*, 900 F.2d 1057, 1059 (7th Cir. 1990) (expressing preference for the entry of *Bourjaily* findings prior to admission of co-conspirator statements, but expressly recognizing that "we have approved admission subject-to-connection" of co-conspirator declarations); *United States* v. *Hernandez*, 829 F.2d 988, 994 (10th Cir. 1987) (recognizing that "the trial court was justified in provisionally admitting the co-conspirator statements subject to being connected up"), cert. denied, 485 U.S. 1013 (1988); *United States* v. *Troutman*, 814 F.2d 1428, 1447-1448 (10th Cir. 1987) (recognizing that "the district court [may] admit the [co-conspirator] statements provisionally, subject to being 'connected up' by subsequent independent evidence"); *United States* v. *Miliet*, 804 F.2d 853, 857 n.2 (5th Cir. 1986) (recognizing that district court may make final determination as to satisfaction of Rule 801(d)(2)(E) "at the conclusion of the evidence"); *United States* v. *Holloway*, 731 F.2d 378, 381 (6th Cir. 1984) (recognizing that "the judge may admit the hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence").

that the only remedy in the case of a finding that some or all of the declarations are inadmissible is a new trial for all the defendants. If the district court had determined that certain co-conspirator declarations were inadmissible, the court could have either given a limiting instruction or entered a mistrial as to Gambino, and it could have continued the trial against the remaining defendants. In any event, the court of appeals agreed with the district court in this case that independent evidence proved that Gambino was a member of the conspiracy and that the statements in issue were made in furtherance of that conspiracy. Pet. App. 69a-73a.

b. Tony Mannino et al. contend that Stefano Zito's statements were "mere narratives of past events and did not further any goal of the conspiracy." 91-439 Pet. 27. Contrary to petitioners' contention, Stefano Zito was a member of the conspiracy, and his statements reflected his participation. For example, after Simone Zito fled in the Spring of 1988, Stefano Zito attempted to collect a heroin debt. Stefano told Reyers that "I know the guy owes us the money because I delivered [four kilograms of heroin] to him." Tr. 3380-3381. In 1987, Stefano told Kane that he had taken one of the heroin couriers to Florida as a reward for successfully smuggling in the heroin that had been exchanged for cocaine. Tr. 1428-1429. Stefano's trip to Florida was confirmed by electronic surveillance. GX 256. Stefano Zito was an active member of the importation conspiracy, and his conversations with his co-conspirators about his activities were essential to the continued functioning of the conspiracy and the allocation of responsibilities within it. Zito's statements were therefore in furtherance of the conspiracy and were admissible

under Federal Rule of Evidence 801(d)(2)(E). See Gov't C.A. Br. 35-38.

2. a. Petitioners contend (91-199 Pet. 28-29; 91-439 Pet. 33) that an immediate mistrial should have been declared after Robert Reyers changed his plea to guilty during the course of the trial and left the defense table. They cite no authority to support the claim that such a drastic remedy was required. Petitioners also claim (91-199 Pet. 30-32; 91-439 Pet. 32) that the district court's instruction that the jury "draw no conclusions" (Tr. 2105) from the fact that Reyers was no longer a defendant was insufficient to prevent the jury from speculating about the reasons for Reyers' disappearance. Yet no defendant objected or asked for a more detailed instruction, and the failure of the district court to give one surely does not amount to plain error. The jury was adequately instructed at the end of the case that "the fact that [others] have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty." Tr. 4489. If anything, petitioners benefited from the district judge's decision not to belabor Reyers' absence.

b. Petitioners next argue (91-199 Pet. 28-29; 91-439 Pet. 34) that Reyers should not have been permitted to testify for the government because he pleaded guilty in the middle of the trial, and that his post-guilty plea testimony was highly prejudicial. Petitioners cite no authority for their proposed "bright line" rule (91-439 Pet. 34) that testimony of pleading co-defendants should be barred if they stood trial for any length of time with the remaining defendants. Absent some showing of prejudice, there should be no bar to a defendant's pleading guilty during trial and then taking the stand. The situation is similar to the more common scenario in which a co-defendant

pleads guilty prior to trial and then testifies. In either case, the jury should be presumed to follow the court's instructions not to use the conviction of a cooperating witness as evidence of the remaining defendants' guilt.[5] *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (recognizing the "almost invariable assumption of the law that jurors follow their instructions"); *Lakeside* v. *Oregon*, 435 U.S. 333, 340 (1978); *Opper* v. *United States*, 348 U.S. 84, 94-95 (1954).

In its final charge, the district court directed the jury to focus on the defendants alone in determining guilt or innocence:

> [A] lot of names have been mentioned in this trial and you are not called upon to decide the guilt or innocence of anyone other than these defendants.
>
> You are expected to consider the evidence as it devolved around those other persons' names as

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[5] The Fifth Circuit faced an analogous issue in *United States* v. *Kilrain*, 566 F.2d 979, 982-983, cert. denied, 439 U.S. 819 (1978). In that case, one William Barber pleaded guilty after two days of a drug conspiracy trial and subsequently took the stand. The Fifth Circuit found no Sixth Amendment violation because the remaining "defendants have not demonstrated any actual prejudice resulting from Barber's supposed knowledge of defense strategy, or that Barber communicated knowledge to the government." *Id.* at 983. Petitioners have similarly failed to meet that burden. They have not cited any information that Reyers may have received while a defendant that was communicated to the government, nor have they demonstrated any other form of prejudice. Such prejudice must be proved; it may not be presumed. See *Weatherford* v. *Bursey*, 429 U.S. 545 (1977) (no constitutional violation where government agent posed as a defendant to preserve his cover and met with another defendant and his counsel to discuss upcoming trial, where defendant demonstrates neither receipt of confidential information by the government nor any other type of prejudice).

> it did, but you are not called upon to decide upon the guilt or innocence of those persons. Indeed, the fact that you may think that some of the other persons may be guilty or you may suspect that they may be guilty of certain offenses, or *the fact that they have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty.*

Tr. 4489 (emphasis supplied). The highlighted language was an obvious reference to those government witnesses who had entered guilty pleas.[6] There were no objections to the court's instruction, and it is obvious that it did not amount to plain error. The complete acquittal of co-defendant Fodera, and co-defendant Varisco's acquittal on the heroin distribution count strongly suggest that the jury was able to distinguish among counts and defendants, and did not return guilty verdicts based merely on association. Cf. *United States* v. *Saenz*, 747 F.2d 930, 942-943 (5th Cir. 1984), cert. denied, 473 U.S. 906 (1985).

3. The government introduced evidence of each cooperating witness's guilty plea during direct examination in anticipation of defendants' cross-examination. Petitioner does not seriously contend that this practice, which has been universally approved, was prejudicial. *E.g.*, *United States* v. *Dworken*, 855 F.2d 12, 30 (1st Cir. 1988); *United States* v. *Louis*, 814 F.2d 852, 856 (2d Cir. 1987); see also 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 410[07], at 410-50 & n.3 (1991).[7]

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[6] The government did not call any witnesses who had been convicted after trial.

[7] Gambino claims (91-199 Pet. 26-27, 34) that he was entitled to limiting instructions as to the use of the guilty pleas at the time Reyers and each cooperating witness testified. Neither Gambino nor his co-defendants requested such instructions, and none raised this issue in the court of appeals (except for a

Gambino contends (91-199 Pet. 35-41), however, that even if it was proper to call Reyers as a witness, his conviction still must be reversed because the prosecutor made an impermissible and prejudicial use of the guilty pleas of Reyers and witness Joseph Cuffaro.

Petitioners' summations to the jury focused on the credibility of the government's witnesses, especially William Kane. Tr. 4291-4305, 4313-4335, 4341-4343, 4345, 4373-4374, 4393, 4405-4410, 4412-4414. As the court of appeals found, the prosecutor's comment was an invited response to comments by petitioners' counsel suggesting that Kane was a liar and that Reyers' testimony proved it. It is of course improper, as petitioner states, to introduce the guilty pleas of others as substantive evidence of a defendant's guilt. But the prosecutor did not suggest that the jury should consider the pleas as evidence of guilt; he referred to them solely to rehabilitate Kane's credibility following an attack by petitioners' counsel in their closing arguments. See *United States* v. *Martinez*, 775 F.2d 31, 36-38 (2d Cir. 1985).[8] The record shows that

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passing reference to the fact that no instruction was given at the time of the testimony (Pet. C.A. Br. 45)). This Court therefore need not consider it. *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 237 (1990).

In any event, the failure to give limiting instructions did not amount to plain error since the jury was given an appropriate limiting instruction in the district court's final charge. Tr. 4489. In both of the cases upon which Gambino relies in claiming plain error (91-199 Pet. 34), the guilty pleas had been introduced as substantive evidence of guilt. *United States* v. *Harrell*, 436 F.2d 606, 614-615 (5th Cir. 1970); *Trussell* v. *United States*, 278 F.2d 478, 480 (6th Cir. 1960).

[8] Gambino's reliance (91-199 Pet. 35) on *United States* v. *Eason*, 920 F.2d 731 (11th Cir. 1990), is misplaced. The court of appeals in that case found that the prosecutor had gratuitously elicited from a witness that the defendant's father had been

defense counsel understood the comment to be directed to Kane's credibility rather than to their clients' guilt. See Tr. 4478, 4481. Furthermore, "[t]he trial judge was in the best position to determine the purpose behind these statements, and he apparently had no doubt that these statements were not being used as substantive evidence of guilt." *United States* v. *Arnold*, 890 F.2d 825, 830 (6th Cir. 1989). Finally, as we have noted, defense counsel did not object to or request an expansion upon the district court's instruction to the jury that "the fact that [others] have been found guilty of ~~those~~ offenses is not evidence that any of these defendants are guilty." Tr. 4489.

The prosecutor's comment was invited because petitioners' counsel expressly accused the Assistant United States Attorneys of suborning perjury. See, *e.g.*, Tr. 4401 (comment by Gambino's counsel). In response to this charge of misconduct by defense counsel, the prosecutor was entitled to argue that Kane was not a perjurer and that Reyers had pleaded guilty based on Kane's testimony against him. See *United States* v. *Robinson*, 485 U.S. 25, 33 (1988) (defendant's attorney argued that government had unfairly deprived his client, who did not testify at trial, of opportunity to explain his actions; Court held that this invited prosecutor's otherwise impermissible response that the defendant had the opportunity to take the stand and testify if he so desired).[9] In par-

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convicted of crimes similar to those charged in the case. The court found that this did not constitute proper impeachment of that witness and was highly prejudicial. *Id.* at 734-735. Here, Reyers' guilty plea was properly introduced, and the prosecutor's rebuttal comment was invited by the defendants.

[9] Gambino contends (91-199 Pet. 36-37) that the response was invited only by counsel for one of his co-defendants. In fact,

ticular, the use of Reyers' guilty plea was proper to answer the defendants' introduction of evidence that Reyers, while still a defendant, had said that Kane was a liar. Reyers' decision to plead guilty to charges that were based largely on Kane's testimony, was tantamount to a retraction of his claim that Kane was a liar who had fabricated his testimony at trial. It was not improper for the prosecutor to refer to Reyers' guilty plea for the limited purpose of answering the defendants' reliance on Reyers' comments regarding Kane's credibility. In sum, the court of appeals' fact-bound determination that the prosecutor's com-

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Gambino's counsel in his own closing statement accused the prosecutors of helping FBI agents to "change [their] testimony to suit the prosecution." Tr. 4396-4397. Gambino's counsel then stated "if an agent can be made to do it, can a felon, an informant, facing life imprisonment, be made to color or change his testimony in a particular fashion, if that's what is needed for the prosecution?" Tr. 4396. Gambino's counsel then argued that one of the prosecutors had coached Kane on a particular point during a lunch break. *Ibid.* Gambino's counsel also stated that Gambino was indicted solely because the prosecutors "didn't have the integrity" (Tr. 4387) to recognize that the government witnesses were unworthy of belief. In light of these comments, the prosecutor's use of Reyers' guilty plea to support Kane's credibility was invited by Gambino as well as by the other petitioners.

ments did not invite the jury to misuse the guilty pleas does not warrant further review in this Court.[10]

4. Tony Mannino et al. contend (91-439 Pet. 14-15) that the government failed to minimize the interception of non-pertinent conversations and to advise the district court of the method that was being used to minimize the interception and use of those conversations.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521, requires that "[e]very order [authorizing electronic surveillance] * * * shall be conducted in such a way as to minimize the interceptions of communications not otherwise subject to interception under this chapter." 18 U.S.C. 2518(5). That provision balances the individual's privacy interest and the government's interest in investigating criminal activity. See *Scott* v. *United States*, 436 U.S. 128, 130 (1978). Section 2518(5) further provides, however, that simultaneous minimization is not required "[i]n the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period." In

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[10] Even assuming that the prosecutor should have avoided the reference to the guilty pleas, it was at most harmless error. An improper summation requires reversal only where "the statements, viewed against 'the entire argument before the jury,' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940), deprived the defendant of a fair trial." *United States* v. *Wilkinson*, 754 F.2d 1427, 1435 (2d Cir.), cert. denied, 472 U.S. 1019 (1985). The prosecutor's comments must be found to have "so infected the trial with unfairness to make the resulting conviction a denial of due process." *Darden* v. *Wainwright*, 477 U.S. 168, 181 (1986). Nothing of the sort occurred here. The prosecutor's remark was an isolated event in the day and a half of closing arguments.

such cases, "minimization may be accomplished as soon as practicable after such interception." *Ibid.*

All government personnel monitoring the communications intercepted by electronic surveillance were given oral and written instructions on minimization and were directed to minimize conversations in English. Tr. 13-14. If the monitoring agent intercepted a non-pertinent English-language conversation, he simply deactivated the listening device. Tr. 27. A large number of intercepted conversations, however, were in Sicilian. Most of those conversations were subject to post-interception minimization by FBI Language Specialist Steven Salvo. Salvo would listen to the beginning of the tape of each Sicilian conversation to determine whether it fell within the scope of the authorization. If it did not, he stopped listening and proceeded to the next conversation. Salvo did not listen to non-pertinent conversations. Tr. 19-20, 81, 96. Only conversations that fell within the terms of the surveillance authorizations were translated. C.A. App. 347-348.

Salvo was the government's sole Sicilian language translator on this investigation.[11] Tr. 55. It was not physically possible for him to monitor the several surveillances that were proceeding simultaneously in connection with this case.[12] Tr. 17. Although the

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[11] Salvo received assistance from another translator who prepared rough drafts of conversations. Tr. 33. Other monitoring agents were trained in Italian. Although the Sicilian dialect is distinct from Italian, those agents were often able to discern whether a conversation pertained to criminal activity. Tr. 36-37, 52-53.

[12] Surveillances were conducted at Leo's Pizza Palace in Pittman, New Jersey; Sal's Pizza in Philadelphia, Pennsylvania; the residences of Simone Zito and Tony Mannino in Eagleville, Pennsylvania; and a black Mercedes Benz automo-

government made every effort to hire additional persons fluent in both English and Sicilian, it was unable to locate individuals who were proficient in Sicilian, who were willing to participate in this type of investigation, and who could obtain the requisite security clearance.[13] Tr. 17-18, 46, 48-49; C.A. App. 348-350. For those reasons, the district court properly concluded that the Sicilian-language conversations were in fact minimized "as soon as practicable" and that "the post-interception minimization procedures used by Agent Salvo were thorough, and limited the government's intrusion into [petitioners'] privacy to both a statutor[ily] and constitutionally acceptable degree." C.A. App. 350.[14]

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bile driven by Simone Zito. Tr. 11-13. The surveillance at the Zito residence, the Mannino residence, and the Mercedes automobile proceeded simultaneously, with Agent Salvo spending much of his time monitoring the Mercedes. When he was not monitoring the Mercedes, he was performing post-interception minimization on conversations intercepted at other locations. Tr. 104.

[13] The case agent was keenly aware of instances in which confidential investigations had been compromised by translators. Tr. 18-19.

[14] The district court in *United States* v. *Gambino*, 734 F. Supp. 1084 (S.D.N.Y. 1990), a criminal case involving Joe Gambino, likewise approved of the electronic surveillance procedures used here. In response to the *Gambino* defendants' objection to post-interception minimization, the district court held:

> The government should only be put to the expense and delay of securing simultaneous minimization if the privacy interests of the defendant clearly warrant such protection. The process of post-interception minimization undertaken by Special Agent Salvo provides essentially the same protection of privacy interests as does simultaneous minimization; in each case, only one government agent is privy to all conversations, and only the relevant conversations are translated into English and preserved as potential evi-

Petitioners infer (91-439 Pet. 12) from the large number of non-pertinent communications intercepted that the monitoring agents failed to minimize. Petitioners do not state whether those conversations were in English or Sicilian. Even if the non-pertinent conversations were in English, the interception of those conversations does not indicate that the agents failed to comply with their obligation to minimize. As the Supreme Court explained in *Scott* v. *United States*, 436 U.S. at 140:

> [B]lind reliance on the percentage of nonpertinent calls intercepted is not a sure guide to the correct answer. Such percentages may provide assistance, but there are surely cases, such as the one at bar, where the percentage of nonpertinent calls is relatively high and yet their interception was still reasonable. * * * Many of the nonpertinent calls may have been very short. Others may have been one-time only calls. Still other calls may have been ambiguous in nature or apparently involved guarded or coded language. In all these circumstances agents can hardly be expected to know that the calls are not pertinent prior to their termination.

This was precisely such a case. Many calls were ambiguous and involved coded language, and the investigation concerned "a wide-ranging conspiracy with a large number of participants." *Id.* at 142.

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dence. Given the difficulty and expense of providing for simultaneous translation of Sicilian conversations, and the delay in activating the wiretaps that such a requirement might have caused, the Court finds that the government's minimization efforts are acceptable under Title III and the Fourth Amendment.

Id. at 1106.

Contrary to petitioners' contention (91-439 Pet. 11), each authorizing judge was fully advised that the government would have to perform post-interception minimization in this case, both in the initial application and in each of the 30-day extension requests. *E.g.*, C.A. App. 205-206. Petitioners rely entirely on the government's omission of any mention of post-interception minimization in the seven-day periodic reports. There was no need to discuss post-interception minimization in those reports, however, because the district court was informed in each 30-day request that the government anticipated the need for post-interception minimization.

Finally, petitioners are wrong when they assert (91-439 Pet. 15) that the government "flagrant[ly] and willful[ly]" disregarded their privacy. Agent Salvo did not listen to any conversation that was determined to be non-pertinent. The only additional invasion of privacy occasioned by post-interception minimization (as compared to the pre-interception minimization petitioners advocate), is that tape recordings were made of certain private conversations, which were then not listened to when it was determined that those conversations were subject to minimization. Neither Agent Salvo nor any other representative of the government has listened to any of those recordings, which remain sealed.[15]

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[15] The procedure followed by Agent Salvo was that envisioned by Congress when it authorized post-interception minimization in the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, Tit. I, § 106(c), 100 Stat. 1856. See S. Rep. No. 541, 99th Cong., 2d Sess. 30 (1986) ("it is contemplated that the translator or decoder will listen to the tapes of an interception and make available to the investigators the minimized portions preserving the rest for possible court perusal later").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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